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ACCELERATION PROVISIONS IN TIME PAPER

DESPITE the testimony of the late J. P. Morgan [1] that the basis of commercial credit is character, his fellow bankers still attach considerable importance to collateral. Negotiable instruments given for a loan frequently state that they are secured by specified stock or bonds or produce documents, and authorize the summary sale of this collateral in the event of nonpayment at maturity. Even this protection does not render the bank entirely safe. The security may begin to depreciate, so that it will be worth much less than the loan before the instrument falls due, and if the bank cannot sell until the date fixed for maturity, a large portion of the loan may be lost. Consequently, it is becoming usual for time paper secured by collateral to contain numerous provisions for the acceleration of payment, if the bank or other holder feels insecure. The note states the present value of the collateral, and agrees that if it depreciates the maker will furnish additional security on request so as to maintain a satisfactory margin above the loan. If he fails to do this, the note immediately falls due, and the bank or other holder is empowered to sell the collateral at once.[2]

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[1] Report of the Committee appointed pursuant to House Resolutions 429 and 504 to investigate the Concentration of Money and Credit, February 28, 1913, page 136. Washington, 1913.

[2] The following form is much used in Boston and the vicinity:

$........... ...., *Mass.*,..................19..
months after date, for value received,
...........promise to pay to the........... Trust Company, of..........., or order, at the said Trust Company..............................Dollars, having deposited with the said Trust Company as collateral security for the payment of this

The instrument is transferable in form, being payable to the bank or its order, and is evidently intended to circulate.

Many bankers would probably be surprised to learn that a form of note in such common use has repeatedly been declared by courts not to be negotiable. Consequently, the holder of the note must prove as part of his case that it was given for consideration, and will take it subject to any defenses which the debtor who made the note has against his creditor, the payee. Such a judicial view obviously renders the instrument unsuited to circulation on the note market, for a purchaser would not usually care to make the necessary inquiries or assume the unavoidable risk of unknown defenses.

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or any other direct or indirect liability of............to the said Trust Company, due or to become due or that may hereafter be contracted, the following described security:

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Should the market value of the security hereby pledged or which may hereafter be pledged for this loan depreciate in the opinion of either the President or Treasurer of said Trust Company,...........agree to furnish satisfactory additional security at the demand of the said Trust Company, so that the market value of the security shall always be at least..........per centum more than the amount of this note. And upon..........failing to deposit such additional security when requested, this note shall become due and payable forthwith, anything hereinbefore expressed to the contrary notwithstanding, and the said Trust Company or its assigns may immediately reimburse themselves by the sale of the security as hereinafter authorized. And....... hereby give authority to the said Trust Company or its assigns to sell, assign, and deliver the whole or any part of the said property, also any security substituted therefor or added thereto, with or without notice or advertisement, either at public or private sale, at the option of the said Trust Company or its assigns, on the non-performance of either of the above promises; any balance of the net proceeds of such sale remaining after paying all sums, whether then or thereafter payable, due from..........to the said Trust Company, on account of this note or otherwise, after paying all legal costs and expenses for collection, sale, and delivery, to be returned to............ And it is further agreed that the said Trust Company or its assigns may bid and become purchasers at such sale, and no other purchaser shall be responsible for the application of the purchase money.

In case the undersigned shall be adjudged a bankrupt, or shall file a voluntary petition in bankruptcy, or shall make a general assignment for the benefit of creditors, or in case a petition shall be filed praying that the undersigned be adjudged a bankrupt, this note shall become forthwith due and payable.

Due........................ ....

For another form, see Cases on Negotiable Instruments, Z. Chafee, Jr., page 101.

The same attitude has been taken by the courts in many states toward similar provisions in another common type of commercial paper, called chattel notes. Such a note is usually given by the buyer of a chattel for the unpaid portion of the purchase price, and states that the seller retains title to the chattel until the note is paid.[3] For example, the purchaser of an automobile has it delivered to him for a small sum in cash and a chattel note for the balance of the price, payable to the seller or his order at a distant day, but containing an acceleration clause that the holder of the note may sue at once and seize the automobile if the buyer attempts to sell it or remove it permanently from the state, or suffers it to be taken by a third party on legal process. Such a provision is often held to destroy the negotiability of the note and turn it into an ordinary contract in writing. If so, the purchaser of the note from the seller can not recover from the buyer of the automobile if the car was defective or the sale fraudulent.

This conflict between mercantile understanding and judicial decision may have far-reaching consequences in the business world. The cases are not unanimous against negotiability, and the legal problem of the effect of these acceleration provisions in collateral time paper is still unsettled. It is therefore worth while to examine the rules of the law of negotiable instruments which are said to be violated by these provisions, and the application of those rules to still other types of paper, which also have a fixed date for payment but mature earlier upon the happening of some event. It will then be possible to determine whether the bank form of promissory notes and the chattel notes are rendered not negotiable by their acceleration clauses.

A negotiable instrument is a substitute for money. It was first used to aid in the payment of money at distant points, and the international bill of exchange still serves that purpose. As an addition to money it increases the purchasing medium in circulation. For instance, if many people did not pay their monthly bills

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[3] In states which hold that the clause as to title makes the instrument invalid as a note, the effect of the acceleration clauses is of course immaterial. Sloan *v.* McCarty, 134 Mass. 245 (1883). It is usually held, however, that the transaction is equivalent to a chattel mortgage by the buyer to the seller, who retains title for security only; the beneficial ownership and risk of loss are in the buyer, who is therefore unconditionally liable upon a negotiable note. Chicago, etc. Equipment Co. *v.* Merchants' Bank, 136 U. S. 268 (1889). The cases are collected in 8 CORPUS JURIS, 129.

by checks, more specie or paper money would be needed in circulation, and economically as well as practically, there is often not enough money to go round. The manufacturer who cannot obtain cash from his customers insists upon a note or accepted bill instead, which he can immediately discount at his bank and turn into money for his pay roll. The bank in turn rediscounts the bill or note with the Federal Reserve Bank, which makes it part of its reserve for the issue of more money in the form of bank notes. Like money a negotiable instrument is intended to have a definite value and to be taken almost at sight, free from the need for investigation into outside facts and unaffected by the claims of former owners, even if it was stolen or lost. When genuine, it ought to serve as the equivalent of money, except for the distant maturity and the risk of insolvency of private persons and their legal incapacity.

Anything so closely related to money and circulating almost as rapidly must be plainly distinguishable from the ordinary non-transferable written contract, just as a five-dollar gold piece is distinguishable from uncoined gold. Therefore, business custom has established several "formal requisites" for a negotiable instrument, which adapt it for quick circulation and give it an unmistakable label. Although the law usually cares little about the form of a contract and looks to the actual understanding of the parties who made it, the form of a negotiable instrument is essential for the security of mercantile transactions. The courts ought to enforce these requisites of commercial paper at the risk of hardship in particular cases. A business man must be able to tell at a glance whether he is taking commercial paper or not. There must be no twilight zone between negotiable instruments and simple contracts. If doubtful instruments are sometimes held to be negotiable, prospective purchasers of queer paper will be encouraged to take a chance with the hope that an indulgent judge will call it negotiable. On the same principle, if trains habitually left late, more people would miss trains than under a system of rigid punctuality.

A few careless persons must be sacrificed so that the world at large will know just what the rule is and regulate its affairs accordingly. Consequently, as Chief Justice Emery puts it,[4]

"Commercial paper has long been governed by special rules which, while designed to ensure justice, are also designed to ensure the free and

[4] Neal *v.* Coburn, 92 Me. 139, 145, 42 Atl. 348 (1898).

safe use of an indispensable commercial agency. The commercial world needs and seeks for the plain workable rule rather than for the somewhat abstract right in each case."

It must not be forgotten, however, that these rules of certainty are not mathematical formulæ evolved out of the pure reason of the judges, but are business requirements created by business needs and susceptible of modification with changing commercial conditions. Law is made for business, not business for law. While the influence of custom on legal principles has sometimes been exaggerated,[5] the history of negotiable instruments leaves no doubt that the courts have based the governing principles upon actual commercial practice, though modifying it when it seemed unreasonable or out of accord with general considerations of justice.[6] Judge Amidon remarks with his refreshing common sense: [7]

"The rule requiring certainty in commercial paper was a rule of commerce before it was a rule of law. It requires commercial, not mathematical, certainty. An uncertainty which does not impair the functions of negotiable instruments in the judgment of business men ought not to be regarded by the courts. The fine phrase of Chief Justice Gibson in the case of *Overton* v. *Tyler*, 3 Pa. 346, . . . that a negotiable instrument 'is a courier without luggage,' has been made to do much service in the discussion of this subject. The real question, however, is who shall determine what constitutes 'luggage' — the business world, or the judge in his library? In no branch of the law has the sound judgment of the English courts shown itself more conspicuously than in the treatment of this subject. Whenever a new instrument, varying in some of its features from the ordinary promissory note or bill of exchange,

[5] J. C. CARTER, LAW, ITS ORIGIN, GROWTH, AND FUNCTION; criticized by J. C. GRAY, THE NATURE AND SOURCES OF THE LAW, §§ 598–641.

[6] Goodwin *v.* Robarts, L. R. 10 Ex. 337 (1875); 2 CAMPBELL'S LIVES OF THE CHIEF JUSTICES, 407, and note, London, 1849.

[7] Cudahy Packing Co. *v.* State National Bank, 134 Fed. 538, 542–43 (C. C. A., 8th, 1904). For presentations of a similar view as to corporate bonds, see 2 MACHEN ON CORPORATIONS, § 1734 *ff.* Edelstein *v.* Schuler, [1902] 2 K. B. 144; Mercer County *v.* Hacket, 1 Wall. (U. S.) 83, 95 (1863), per Grier, J.: "A mere technical dogma of the courts or the common law can not prohibit the commercial world from inventing or using any species of security not known in the last century. Usages of trade and commerce are acknowledged by courts as part of the common law, although they may have been unknown to Bracton or Blackstone. And this malleability to suit the necessities and usages of the mercantile and commercial world is one of the most valuable characteristics of the common law." First National Bank of Springfield, Ohio *v.* Skeen, 101 Mo. 683, 687, 14 S. W. 732 (1890). The unfortunate results of a rigid *a priori* doctrine are pointed out by A. M. Kidd in 6 CAL. L. REV. 444 (1918). See note 166.

has been presented for admission to the class of commercial paper, those courts have called for their guidance men from the actual business world, best qualified to speak on the subject. If, from their evidence, it has appeared that the instrument in question was by the general custom and practice of the business world treated as a negotiable instrument, the court has given effect to that usage, and adjudged the instrument to be subject to the same law as other negotiable paper. This was true not only in the early and formative periods of the commercial law, coming down to the age of Lord Mansfield, but has been followed with the same freedom from time to time down to the current year. Those courts have never forsaken the business world to pursue a definition."

Consequently, we must always interpret the formal requisites with our eyes upon the actual conduct of life, continually testing them by the ultimate purpose of negotiable instruments, free circulation as a substitute for money. In other words, a formal requisite is only a concise statement of a method for avoiding the evils of uncertainty, and when those evils do not arise the requisite cannot properly be said to be violated.

The formal requisites which may conceivably render invalid instruments with acceleration provisions are three in number: the sum payable must be a sum certain; [8] the instrument must be payable on demand, or at a fixed or determinable future time; [9] it must not contain an order or promise to do anything in addition to the payment of money.[10] Of these, the second is the most important and must be fully considered at once. The other two will be discussed subsequently.

Much of the confusion in the cases is due to the failure of the courts and textbooks [11] to distinguish between the requisite of certainty of time and that which forbids the instrument to be conditional.[12] Some instruments violate both requisites. For instance, if a note is payable when the maker marries, it is conditional since he may never marry, and furthermore, if he does the time of pay-

[8] NEGOTIABLE INSTRUMENTS LAW, §§ 1 (2), 2; 2 AMES, CASES ON BILLS AND NOTES, 830; 1 DANIEL, NEGOTIABLE INSTRUMENTS, 6 ed., § 53.

[9] NEGOTIABLE INSTRUMENTS LAW, §§ 1 (3), 4; 2 AMES, CASES ON BILLS AND NOTES, 831.

[10] NEGOTIABLE INSTRUMENTS LAW, § 5; 2 AMES, CASES ON BILLS AND NOTES, 829; 1 DANIEL, NEGOTIABLE INSTRUMENTS, 6 ed., § 59.

[11] An example is 1 DANIEL, *op. cit.*, Chap. II, Section III.

[12] NEGOTIABLE INSTRUMENTS LAW, §§ 1 (2), 3; 2 AMES, CASES ON BILLS AND NOTES, 827.

ment is very uncertain.[13] On the other hand, if it is payable when he dies, it is unconditional and sure to be payable eventually, but no one can say when. A condition is a fatal objection for purposes of free circulation on the money market. The prospective purchaser cannot tell from inspection of the paper whether it will ever be exchanged for money, but must inquire into outside facts, oftentimes in the future, to learn if the condition is performed. There is not time in the rapid dealings of the market to ascertain more than the genuineness of the signatures, and the solvency and legal capacity of the signers. Consequently, it has always been settled that a conditional order or promise is not negotiable.

Unfortunately many judges have jumped to the opposite proposition, that any unconditional promise or order is negotiable.[14] If the day of payment is sure to arrive some time, the objection just considered does not arise, and therefore they conclude that it is immaterial when that day is to arrive. The statutes perpetuate the confusion.[15] The law tends to overlook the fact that an unconditional instrument with an uncertain time for payment may be open to other and very serious objections.

1. Its value is rendered uncertain. The time element in value is well understood. The distance to maturity determines the discount upon a non-interest-bearing obligation. If it bears interest above the market rate, a long-time security will command a premium diminishing as maturity approaches; *vice versa*, if the interest is low. So close is the relation of time to value, that the price of a gilt-edged bond may be accurately ascertained from mathematical tables, given the maturity, return, and current interest-rate. On the other hand, if the maturity of an instrument is uncertain, the premium or discount becomes purely speculative. One hesitates to offer a premium for even a ten per cent note due at the maker's death, for it may be paid off next week at par. Nobody can tell what it will sell for a year hence. Life-tables cannot determine the

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[13] Such instruments are always held bad. 1 AMES, CASES ON BILLS AND NOTES, 30, and note.

[14] Colehan *v.* Cooke, Willes, 393 (1743), note payable ten days after death of maker's father, is the leading case.

[15] NEGOTIABLE INSTRUMENTS LAW, § 4 (3): "An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable, . . . on or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain." BILLS OF EXCHANGE ACT, § 11 (2) is practically the same.

duration of this particular existence. And the value of paper with uncertain maturity is rendered still more speculative by the objections about to be considered, which make it possible that the promise though unconditional in terms will never be performed because of unknown defenses to which the purchaser will be subject when he sues.

2. If the time of payment is uncertain it may have already occurred. If so, the paper is in fact overdue and affected by the equitable defenses of prior parties. On business paper, maturity should be definite, so that any one who buys after maturity will do so with eyes open.

3. If the maturity has occurred six years before (less in some states), the Statute of Limitations will defeat recovery, even if there are no other defenses. The statute may have run before the purchase or before the holder can ascertain the date of the critical event, such as some one's death, which fixed maturity.

4. Even if maturity has not yet arrived, it is essential for the holder to know in advance just when it will come, so that he may present the instrument to the primary party and give notice of dishonor to the secondary parties in order to make them liable to him. If a note is payable at the death of the maker's father, he must, to be safe, maintain telegraphic communication with his deathbed.[16] If it is payable at the end of the war, does this mean November 11, 1918, or the signing of the peace treaty, or its ratification by the Senate, or the President's proclamation of peace? The holder's failure to determine the critical date correctly and act at once will forfeit his rights against indorsers.[17]

5. A less serious difficulty is, that the obligors on the instrument ought to know the time of payment definitely, so that the primary party may have funds ready as the day approaches, and the secondary parties may watch him and protect themselves if he appears unprepared to pay. Good business policy requires that men shall foresee the maturity of their obligations and adjust their affairs accordingly.

6. Because of these specific objections, the paper is unsuited to

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[16] Yet such instruments are always held negotiable. Colehan *v.* Cooke, Willes, 393 (1743); McClenathan *v.* Davis, 243 Ill. 87, 90 N. E. 265 (1909); 1 DANIEL, *op. cit.* § 46 note 22.

[17] For cases upholding Civil War notes, see 1 DANIEL, *op. cit.*, § 49.

rapid circulation in the legitimate money market. Its speculative value, the need of inquiry into outside facts, and the risk of hidden defenses make business men fight shy of it and prevent it from being a substitute for money at all. It should be classed as an ordinary simple contract, and not as a circulating instrument.

Notwithstanding these objections, American decisions have gone very far in upholding instruments with no certain time for payment.[18] Our problem is different, for it concerns paper with a certain maturity and provisions for a contingent earlier payment. However, the judicial attitude toward acceleration clauses has been affected by the widespread disregard of the requisite of certainty of time in the decisions just mentioned, and the prevalence of the maxim that an instrument is good so long as the day of payment must ultimately arrive, a maxim which would logically validate all acceleration paper. On the other hand, the recognition of the time requisite in the Negotiable Instruments Law [19] has brought a general stiffening of standards, which has reacted upon acceleration cases.

Before examining the decisions upon the various forms of acceleration provisions, including those in collateral and chattel notes, I shall present the principles which seem to me controlling.

There are two broad classes of negotiable instruments without acceleration provisions, each of which has its own distinctive method of satisfying the formal requisite of certainty of time. (*a*) In time paper, "the time of payment of a bill or note must be obvious from the bare inspection of the instrument." (*b*) In demand or sight instruments, the time is not certain at the outset, but is fixed "by the performance of an act regularly incident to the collection of the paper." [20] Thus, a demand note becomes payable by the maker's act of tender of money, or the holder's act of presentment for payment.[21] A sight bill is made certain by the

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[18] 1 DANIEL, *op. cit.*, § 43 *ff*.

[19] § 4.

[20] 2 AMES, CASES ON BILLS AND NOTES, 831. THE NEGOTIABLE INSTRUMENTS LAW presents the two methods in a little different way. § 1 (3) says the instrument "must be payable on demand, or at a fixed or determinable future time." § 4 (1) says the time is "determinable" in sight bills.

[21] In demand notes presentment for payment does determine maturity if payment is thereupon made. If, however, payment is not made, maturity is determined regardless of demand. For purposes of suit or the Statute of Limitations, the note matures

holder's act of presentment for acceptance. Apart from the well-established exception of instruments payable after some one's death, which is perhaps commercially justifiable because of the prevalence of life-estates which are anticipated by borrowing, maturity cannot properly be fixed by an extrinsic event, which is not closely connected with the collection of the instrument. In other words, business men should not be affected by facts which are not on the instrument or part of the business methods of collection and payment.

Now, the effect of the ordinary acceleration provision is to combine these two classes of paper in one instrument. A note payable on or before July 1 is like Class (*a*) in having a definite maturity, and like Class (*b*) in having a movable time of payment fixed by the maker's tender or the holder's demand. My contention is that the law merchant recognizes only the two methods of satisfying the formal requisite of certainty of time. An instrument may use either or both of these two methods of stating its maturity, but it cannot regulate its maturity by some outside event. An acceleration provision is analogous to a demand note. The business world allows paper with a movable time of payment, but it cannot bother with it unless the time is eventually fixed by a business fact. This applies just as much to paper with an ultimate definite maturity and an acceleration provision, as to paper with no stated date for payment at all and maturing at an uncertain time. Consequently, I would state my first principle as to acceleration provisions thus:

I. *An instrument with an acceleration provision in order to be negotiable must conform to the following requirement. The ultimate time of payment must be obvious from the bare inspection of the instrument; and payment can be accelerated only by the performance of an act regularly incident to the collection of the paper.*[22]

To this I would add two other principles, leaving the argument in their support till later:

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when it is written. For purposes of charging secondary parties and letting in equities, it matures after a reasonable time. Thus it might be said that the maturity of a demand note is in fact certain from the outset, being either its issue or the end of a reasonable time. From this point of view, no act is necessary to fix maturity.

[22] This combines Ames' alternative requirements in one. 2 AMES, CASES ON BILLS AND NOTES, 831.

II. *The ultimate time of payment is the maturity of the instrument for all purposes with respect to persons who have not received notice that the fact which was to accelerate payment has occurred.*

III. *The time fixed by the acceleration provision is the maturity of the instrument for all purposes with respect to persons who have received notice that the fact which was to accelerate payment has occurred.*

We can now proceed to the authorities on the various types of acceleration provisions.

INSTRUMENTS PAYABLE "ON OR BEFORE" A SPECIFIED DAY

This is the simplest form of acceleration provision, and is valid on principle, because the acts causing acceleration are incidental to collection of the instrument. At common law, it did not impair negotiability, except in Massachusetts,[23] and it is expressly permitted by the Negotiable Instruments Law.[24] With regard to the objections involved in uncertainty of time, the cases say very little, so that some discussion of this question is needed.

If the maker alone has the option of accelerating payment, the matter is simple. "The legal rights of the holder are clear and certain; the note is due at a time fixed, and it is not due before. . . . This option if exercised, would be a payment in advance of the legal liability to pay, and nothing more." [25] "For all purposes of negotiation it is to be regarded as a note payable solely on the day therein named." [26] If the maker's tender is accepted and payment made, no further question will arise, unless the note is left in circulation. In that event, a *bonâ fide* purchaser before the ultimate date of maturity will be free from equities and can oblige the maker to pay a second time.[27] He is like the purchaser of a demand note, paid but wrongfully kept by the owner and renegotiated to an

[23] See cases in notes 25, 26, 27, 29, and 32.

[24] § 4 (2): "An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable . . . on or before a fixed or determinable future time specified therein."

[25] Cooley, J., in Mattison *v.* Marks, 31 Mich. 421 (1875), construing "on or before" to give only the maker an option.

[26] Jordan *v.* Tate, 19 Ohio St. 586 (1869); Helmer *v.* Krolick, 36 Mich. 37 (1877); Harrison *v.* Hunter, 168 S. W. 1036 (Tex. Civ. App. 1914); Bates *v.* Leclair, 49 Vt. 229 (1877).

[27] Fogg *v.* School District of Sedalia, 75 Mo. App. 159 (1898); *contra*, Hubbard *v.* Mosely, 11 Gray (Mass.) 170, 172 (1859) *semble;* but see note 32 for later Massachusetts statute.

innocent buyer before equities are let in.[28] If his tender is refused, there can be no dispute about the time equities are let in or notice of dishonor should be given, for there is no dishonor. The Statute of Limitations begins to run at the specified date.[29] One difficulty is that tender stops the running of interest; [30] if the holder after his refusal negotiated the paper to a purchaser without notice of the tender, could that purchaser collect interest? On principle, the tender, like actual payment, should affect only holders who know of it.[31] A similar question might arise on an ordinary demand note, negotiated after tender but before equities are let in. Another difficulty is that the holder may be deprived of his investment at any time if the maker pays up, so that the value is uncertain. The objection, while real, applies also to a demand note. Therefore, an instrument payable on or before a certain date at the option of the maker is negotiable,[32] including such securities as Liberty

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[28] Nash *v.* De Freville, [1900] 2 Q. B. 72 (C. A.); State *v.* Wells, Fargo & Co., 15 Cal. 336 (1860).

[29] In Ackley *v.* Hall, 113 U. S. 135, 140 (1885), Harlan, J., said: "The debtor incurred no legal liability for nonpayment until that day passed."

[30] Wright *v.* Robinson, 84 Hun (N. Y.) 172, 177, 32 N. Y. Supp. 463 (1895); Chapman *v.* Wagner, 1 Neb. Un. 492, 496 (1901).

[31] This was apparently Dean Ames' opinion, 2 CASES ON BILLS AND NOTES, 831: "The option of the maker seems indeed to be of no significance, except in the case of interest-bearing instruments, and even in these the fact that the maker may by a tender bar the right of him to whom the tender is made to claim interest accruing subsequent to the tender seems hardly to render the instrument uncertain in the commercial sense of the term."

But in Pemberton *v.* Hoosier, 1 Kan. 108, 114 (1862), Bailey, J., in upholding an "on or before" note, seems to think that a purchase before the ultimate date must inquire as to the possible prior payment: "The defendants promise to pay a sum certain on a day certain, provided only, that it is not paid *before* that time. The condition is only such as the law annexes to all promises to pay, and the effect of expressing such a condition is simply to charge third parties with notice."

[32] Cases cited in notes 25, 26, 27, 29, *supra;* also the following cases out of a large number. Union Loan & Trust Co. *v.* Southern California Motor Road Co., 51 Fed. 840 (Cal. Code, 1892); Cowing *v.* Cloud, 16 Colo. App. 326, 65 Pac. 417 (1901); Leader *v.* Plante, 95 Me. 339, 50 Atl. 54 (1901). First National Bank of Springfield, Ohio *v.* Skeen, 29 Mo. App. 115 (1888) — if negotiability is denied, lenders will refuse the concession of earlier payment, and "thus ensues oppression of the debtor class," affd. 101 Mo. 683; 14 S. W. 732 (1890); Curtis *v.* Horn, 58 N. H. 504 (1878); National Bank *v.* Kenney, 98 Texas, 293, 83 S. W. 368 (1904) *semble;* Cunningham *v.* McDonald, 98 Texas, 316, 83 S. W. 372 (1904); Lovenberg *v.* Henry, 104 Texas, 550, 140 S. W. 1079 (1911), "on or before" construed as maker's option. *Contra,* Hubbard *v.* Mosely, 11 Gray (Mass.) 170 (1858); Way *v.* Smith, 111 Mass. 523 (1873); Stults *v.* Silva, 119 Mass. 137 (1875); Farmers' Loan & Trust Co. *v.* McCoy, 32 Okla. 277, 122

Bonds, which are redeemable at an earlier date at the option of the obligor.[33]

Even if the maker has the option to pay in parts, the same result follows.[34] There is, indeed, an additional difficulty here, for the paper is not surrendered after a part payment, and may be negotiated afterwards as if wholly unpaid. Although the cases do not raise this point, it seems, by analogous cases and the principles of this article, that a purchaser without actual notice of prior part payments can collect in full, unless they are indorsed on the instrument, just as he can if an accelerated payment in full was made.[35]

Instruments payable "on or before" a fixed date at the option of the holder raise different questions from those subject to the maker's option. The holder cannot be deprived of his investment without his consent, so that its value is absolutely certain. Nevertheless, it has been held in Massachusetts [36] that several of the other objec-

Pac. 125 (1912), statute prior to N. I. L., note gave discount for early payment; National Bank of Commerce *v.* Feeney, 12 S. D. 156, 80 N. W. 186 (1899), same. The Massachusetts law was changed by STAT. of 1888, c. 329: "No written promise to pay money shall be held not to be a promissory note, or not to be negotiable for the reason that the time of payment is uncertain: *provided*, that the money is payable at all events and at some time that must certainly come." Lowell Trust Co. *v.* Pratt, 183 Mass. 379, 67 N. E. 363 (1903). See also Union Cattle Co. *v.* International Trust Co., 149 Mass. 492, 21 N. E. 962 (1889), bonds. Massachusetts, Oklahoma, and South Dakota have adopted the N. I. L. The Oklahoma and South Dakota cases may rest on uncertainty of amount because of the discount; so also where interest is waived if payment is accelerated, Lamb *v.* Story, 45 Mich. 488, 8 N. W. 87 (1881); Story *v.* Lamb, 52 Mich. 525, 18 N. W. 248 (1884); or a premium must be paid, Chouteau *v.* Allen, 70 Mo. 290, 339 (1879).

[33] Hughes County *v.* Livingston, 104 Fed. 306 (C. C. A. 8th, 1900). Where there are two possible dates of payment, as with Liberty Bonds, and there is a public announcement of redemption at the earlier date, it is possible that the bonds would afterwards be overdue; but see note 27.

[34] Bowie *v.* Hume, 13 App. D. C. 286, 309 (1898); Crocker *v.* Green, 54 Ga. 494 (1875); Lowell Trust Co. *v.* Pratt, 183 Mass. 379, 67 N. E. 363 (1903), see note 32; Fisher *v.* O'Hanlon, 93 Neb. 529, 141 N. W. 157 (1913, N. I. L.). Riker *v.* Sprague Mfg. Co., 14 R. I. 402 (1884), maker's option to pay not less than five per cent of principal on semiannual interest dates; *Contra*, Pierce *v.* Talbot, 213 Mass. 330, 100 N. E. 553 (1913), *semble*, overlooking STAT. 1888, c. 329, and Lowell Trust Co. *v.* Pratt, *supra*; Bell *v.* Riggs, 34 Okla. 834, 845, 127 Pac. 427 (1912), under statute prior to N. I. L., raising objection that interest would stop on the portion paid.

A provision that the advance payments are not to be borrowed elsewhere does not impair negotiability. Lasher *v.* Union Central Life Insurance Co., 115 Iowa, 231, 88 N. W. 375 (1901); *contra*, Union Central Life Insurance Co. *v.* Champlin, 11 Okla. 184, 65 Pac. 836 (1901).

[35] See note 27, *supra*.

[36] Mahoney *v.* Fitzpatrick, 133 Mass. 151 (1882), — "on demand or in three years";

tions caused by uncertainty of time are fatal to the negotiability of these instruments. While either time paper or demand paper is valid, here is paper which is both, and apparently has two maturities of equal importance. It is uncertain whether the Statute of Limitations runs from the fixed date, or from demand, or from issue, whether equities are let in and indorsers should be charged after the fixed date, or after demand, or after a reasonable time from issue. The Massachusetts court concludes that probably the exercise of the holder's option fixes the maturity at the day of demand.[37] Consequently, a subsequent purchaser before the fixed date, though ignorant of the dishonor, would be subject to equitable defenses and unable to sue the indorsers if notice of the dishonor had not been given them.

This Massachusetts interpretation of the effect of demand by the holder seems untenable. In the first place, a business man would naturally consider that the instrument has only one maturity, the fixed date, and that the demand clause is incidental and subordinate, to provide for emergencies. Secondly, these instruments are negotiable in every state which has adopted the Uniform Act,[38] and it would be contrary to the fundamental rights of the holder in due course to subject him to hidden equities and oblige him to investigate outside facts, inquiring whether demand had been made and refused. Furthermore, an unknown demand should be without legal significance. The purchaser of an ordinary demand note within a reasonable time after its issue is not subject to equities if ignorant of a prior dishonor.

This brings us to a striking and well-established analogy, which strongly supports the underlying principles of this article. Every bill of exchange payable on time has an implied acceleration provision. Though possessing a fixed date of payment, yet if it is presented for acceptance, and acceptance is refused, it becomes due at once.[39] The time for payment is accelerated. However, the acceleration affects only the existing holder and such subsequent

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changed by STAT. 1888, c. 329, and N. I. L. § 4 (2). Such instruments were upheld at common law elsewhere. Louisville *v.* Gray, 123 Ala. 251, 26 So. 207 (1898); Protection Insurance Co. *v.* Bill, 31 Conn. 534 (1863).

[37] 133 Mass. 151, 153 (1882).

[38] NEGOTIABLE INSTRUMENTS LAW, § 4 (2).

[39] NEGOTIABLE INSTRUMENTS LAW, § 151; Sterry *v.* Robinson, 1 Day (Conn.) 11 (1802).

holders as have notice of the dishonor. As to them the bill is overdue;[40] drawer and indorsers are discharged by want of notice;[41] and the Statute of Limitations runs from the dishonor.[42] As to holders in due course, ignorant of the dishonor, the instrument remains due for all purposes at the original maturity, and the acceleration is immaterial.[43] The implied acceleration provision of the bill of exchange operates according to the principles stated on page 756 of this article. (I) Acceleration is by an act incidental to the collection of the instrument, presentment for acceptance; (II) it applies to persons with notice; (III) it does not apply to persons without notice.

The same principles should govern express acceleration provisions generally. A purchaser ignorant of the fact of acceleration is, in the words of the Negotiable Instruments Law,[44] a holder in due course of the instrument, because "he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact." Therefore, he can rely on the face of the instrument, treat it as maturing at the stated day, and recover its full amount at that time.[45]

Consequently, on instruments payable "on or before" a fixed date at the holder's option, the fixed term is maturity for all purposes except for persons with notice of demand and refusal.[46] Such instruments are well fitted for circulation, for they offer a durable investment, with the possibility of earlier collection when the holder needs the money or apprehends the insolvency of the obligor.[47]

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[40] Goodman *v.* Harvey, 4 Ad. & El. 870 (1836); N. I. L. § 52 (2).

[41] Whitehead *v.* Walker, 9 M. & W. 506, 513, 514 (1842); Bartlett *v.* Benson, 14 M. & W. 733 (1845); Robinson *v.* Ames, 20 Johns. (N. Y.) 146, 150 (1822), *semble.*

[42] Whitehead *v.* Walker, 9 M. & W. 506 (1842).

[43] Dunn *v.* O'Keefe, 5 M. & S. 282 (1816); N. I. L. § 117.

[44] § 52 (2).

[45] N. I. L. § 57.

[46] Louisville *v.* Gray, 123 Ala. 251, 256, 26 So. 207 (1898), — note authorizing the payee bank to appropriate makers' deposit in payment at any time. Tyson, J.: "The purchaser would have the right to presume, unless the sum appropriated by the bank [payee] . . . was indorsed somewhere upon the note, that none had been made by the bank; and that the full amount was owing by the makers."

[47] The holder can call for part payments in advance. Protection Insurance Co. *v.* Bill, 31 Conn. 534 (1863). Such a note is subject to special difficulties, for it is not surrendered upon payment, and may be negotiated to a purchaser ignorant of the prior part payment, who would, it seems, recover from the maker in full. For analogous instruments, see note 108, *infra.* The note in Protection Insurance Co. *v.* Bill had an additional peculiarity, in that advance payments could be required "within thirty

CONVERTIBLE INSTRUMENTS

Negotiable notes and bonds often provide that the holder may at his option, upon surrender of the instrument, receive instead of money certificates of stock or other securities. Thus Anglo-French notes are convertible into long-time bonds. If the conversion privilege may be exercised before maturity, it is an acceleration provision, similar to the holder's option to demand money and equally valid.[48] The time is clearly certain. The promise is not for "an act in addition to the payment of money," but incidental, and allowed by common law and the Negotiable Instruments Law.[49] The promise to deliver securities, though not in itself a negotiable instrument since not performed by the payment of money, acquires the negotiability of the principal obligation, by analogy with the principle that the security follows the debt. There can be no doubt that the bondholder can enforce the conversion privilege in his own name,[50] and mercantile custom certainly makes him free from

days after demanded, or upon a notification of thirty days in any newspaper printed in Hartford." This provision also was held not to impair negotiability, Dutton, J., dissenting. It is doubtful whether the acts of acceleration are incidental to the collection of the instrument, within the first principle of this article. However, a promise to pay on demand after six months' notice has been held a note, Walker *v.* Roberts, Carr. & Marsh, 590 (1842); White *v.* Wadhams, 170 N. W. 60 (Mich., 1918, N. I. L.); 1 AMES CAS. BILL AND NOTES, 88, note; but see 2 AMES, *Ibid.*, 831–23. Demand of payment by advertisement may perhaps be justified by the analogy of bonds, which are frequently redeemed by the obligor after advertisement. Union Cattle Co. *v.* International Trust Co., 149 Mass. 492, 21 N. E. 962 (1889). See, also, Stillwell *v.* Craig, 58 Mo. 24 (1874). If the advertisement renders the note due in Protection Insurance Co. *v.* Bill, as against a maker ignorant thereof, is the note afterwards overdue as regards a subsequent purchaser who never saw the advertisement?

[48] Hotchkiss *v.* National Banks, 21 Wall. (U. S.) 354 (1874); Loomis *v.* Chicago, M. & St. P. Ry. Co., 102 Fed. 233 (C. C. A. 2d, 1900); Lisman *v.* Milwaukee, L. S. & W. Ry. Co., 161 Fed. 472, 475 (Wis. 1908), *semble.* Hodges *v.* Shuler, 22 N. Y. 114 (1860); Welch *v.* Sage, 47 N. Y. 143 (1872); Denney *v.* Cleveland and Pittsburg R. R. Co., 28 Ohio St. 108 (1875).

[49] See note 48; also cases without acceleration provision. Vermilye *v.* Adams Express Co., 21 Wall. (U. S.) 138 (1874); Dinsmore *v.* Duncan, 57 N. Y. 573 (1874). N. I. L. § 5 (4).

[50] *Dicta* in Loomis *v.* Chicago, M. & St. P. Ry. Co., *supra;* Hodges *v.* Shuler, *supra;* Welch *v.* Sage, *supra;* Denney *v.* Cleveland & Pittsburg R. R. Co., *supra. Contra,* 2 AMES, CASES ON BILLS AND NOTES, 829–16.

Other kinds of incidental provisions are transferable, so that the holder of the negotiable instrument can sue in his own name. Power to sell collateral at maturity: Arnold *v.* Rock River R. R. Co., 5 Duer (N. Y.) 207, 214 (1856), *semble.* Waivers of exemption, etc.: Zimmerman *v.* Anderson, 67 Pa. St. 421 (1871). Power to confess

equities.[51] Otherwise, the marketability of convertible securities would be considerably impaired. However, the promise to deliver documents cannot bind indorsers, and even the maker is sometimes discharged from the conversion obligation by subsequent events, though still liable to pay money.[52] Probably the exchange of the instrument for the securities before maturity has no more effect than premature payment [53] if the instrument gets into circulation again before the stated maturity, and a *bonâ fide* purchaser can recover its value. However, indorsement of the election to convert upon the instrument operates as cancellation and terminates negotiability thenceforth, even if the indorsement is fraudulently and totally erased.[54]

A note convertible into merchandise at maturity is negotiable,[55] and the conversion can doubtless be permitted before maturity if the instrument must thereupon be surrendered. However, if goods or labor can be demanded from time to time, the instrument becomes little more than a running charge-account with unlimited room for disputes as to the value of the part performances, and should not be considered negotiable.[56]

All conversions must be at the option of the holder, and not of the obligor.[57]

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judgment at maturity on behalf of "holder": National Exchange Bank *v.* Wiley, 195 U. S. 257 (1904), and cases cited. The authorities are divided as to guarantees written on the instrument, 2 DANIEL, NEGOTIABLE INSTRUMENTS, 6 ed., § 1776 *ff.*

[51] Citations in preceding note. *Contra*, Lisman *v.* Milwaukee, L. S. & W. Ry. Co., 161 Fed. 472, 475 (Wis. 1908), *semble*, cited in Gay *v.* Burgess Mills, 30 R. I. 231, 242, 74 Atl. 714 (1909), *semble*. But a strong analogy for complete negotiability of the conversion privilege is found in mortgages, which pass with the notes free from equities. See W. E. Britton, "Assignment of Mortgages Securing Negotiable Notes," 10 ILL. L. REV. 337.

[52] Lisman *v.* Milwaukee, L. S. & W. Ry. Co., *supra;* Gay *v.* Burgess Mills, *supra;* and Massachusetts cases cited therein.

[53] State *v.* Wells, Fargo & Co., 15 Cal. 336 (1860). The cases *contra* are certainly unsound. Board of Education *v.* Sinton, 41 Ohio St. 504 (1885); Branch *v.* Commissioners of Sinking Fund, 80 Va. 427 (1885).

[54] Dinsmore *v.* Duncan, 57 N. Y. 573 (1874).

[55] Mosely *v.* Walker, 84 Ga. 274, 10 S. E. 623 (1889); Preston *v.* Whitney, 23 Mich. 260 (1871); Hosstatter *v.* Wilson, 36 Barb. (N. Y.) 307 (1862); McDonell *v.* Holgate, 2 Revue de Législation et de Jurisprudence, 29 (Quebec, 1818).

[56] Dennett *v.* Goodwin, 32 Me. 44 (1850); *contra*, Owen *v.* Barnum, 7 Ill. 461 (1845).

[57] Merriwether *v.* Saline County, 5 Dill. (U. S.) 265 (Mo. 1878).

Acceleration by Default of Installments or Interest

Another type of provision generally recognized as valid at common law, and under the Bills of Exchange Act [58] and the Negotiable Instruments Law [59] accelerates payment on default of an installment of principal [60] or even an interest payment.[61] Sometimes, several notes are issued, arranged to fall due on successive dates, and each stating that if one note is dishonored the whole series is payable at once.[62] It is clear that such instruments are not entirely certain as to amount or time, but the law plainly holds that they do not possess the kind of uncertainty which renders the paper unsuitable for circulation.

While the Negotiable Instruments Law recognizes such paper as negotiable, it does not decide certain difficult questions which arise about the operation of the acceleration clause. The first problem involves its meaning, whether or not it gives the holder an option to waive default.

1. *Automatic Acceleration on Default.*—Several cases hold that by its definite language the instrument automatically becomes due upon default, although the holder might prefer to overlook the failure to pay. The provision is said to exist for the benefit of obligor as well as obligee, and the courts refuse to make a new contract different from the expressed words of the parties.[63] If this

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[58] § 9 (1) (*c*); like the N. I. L., except for the omission of the words "or of interest."

[59] § 2 (3): "The sum payable is a sum certain within the meaning of this act, although it is to be paid . . . by stated installments, with a provision that upon default in payment of any installment or of interest the whole shall become due."

The act does not expressly allow acceleration by default of interest in noninstallment notes, or acceleration of series notes, but they are clearly negotiable under the act. See cases in notes 61 and 62.

[60] Carlon *v.* Kenealy, 12 M. & W. 139 (1843); Miller *v.* Biddle, 13 L. T. R. 334 (1895). The American cases are in notes 63 *ff.*, *infra.*

[61] Gillette *v.* Hodge, 170 Fed. 313 (Minn., C. C. A. 8th, 1909); Belloc *v.* Davis, 38 Cal. 242 (1869); and many cases in notes 63 *ff.*, *infra. Contra*, Meyer *v.* Weber, 133 Cal. 681, 65 Pac. 1110 (1901), 3 JJ. dissenting; Bell *v.* Riggs, 34 Okla. 834, 127 Pac. 427 (1912), statutes prior to N. I. L. Under N. I. L., held valid, First National Bank *v.* Garland, 160 Ill. App. 407 (1911); Newbern *v.* Duffy, 153 N. C. 62, 68 S. E. 915 (1910). Oklahoma now has N. I. L., also California.

[62] Chicago Ry. Equipment Co. *v.* Merchants' Bank, 136 U. S. 268 (1890), is an example. Under N. I. L., Schmidt *v.* Pegg, 172 Mich. 159, 137 N. W. 524 (1912); Bright *v.* Offield, 81 Wash. 442, 143 Pac. 159 (1914), *semble.*

[63] Moline Plow Co. *v.* Webb, 141 U. S. 616 (1891), *semble*, construing Texas Statute of Limitations in view of Texas State case *infra;* Ryan *v.* Caldwell, 106 Ky. 543, 50

construction is correct the effect on all holders with notice of the default is clear. The Statute of Limitations begins to run at default;[64] the holder must give notice to secondary parties or discharge them as to the whole amount due,[65] and the paper is thenceforth subject to equities.[66] The holder must bring one action for the whole amount due; and if he sues for one portion only, judgment will bar further suits for the other portions.[67]

On the other hand, if the instrument is in the hands of a purchaser ignorant of the default, the fixed date is maturity for all purposes, and the acceleration is disregarded. While no cases precisely in point have been discovered, it is clear that this result must follow if the instrument is to circulate freely. Furthermore, we have the analogy, already mentioned, of *Dunn* v. *O'Keefe*.[68] A

S. W. 966 (1899); Buss *v.* Kemp, 170 Pac. 54 (N. M. 1918); Banzer *v.* Richter, 68 Misc. 192, 123 N. Y. Supp. 678 (1910); Harrison Machine Works *v.* Reigor, 64 Texas, 89 (1885); Kelly *v.* Kershaw, 5 Utah, 295, 299, 14 Pac. 804 (1887); Hodge *v.* Wallace, 129 Wis. 84, 108 N. W. 212, N. I. L. (1906).

The same absolute effect was given to a mortgage securing serial notes and providing that default of one note should mature all, in First National Bank *v.* Peck, 8 Kan. 660 (1871); Snyder *v.* Miller, 71 Kan. 410, 80 Pac. 970 (1905); Green *v.* Frick, 25 S. D. 342, 126 N. W. 579 (1910); San Antonio, etc. Association *v.* Stewart, 94 Texas, 441, 61 S. W. 386 (1901); and to other default clauses in a mortgage in Moore *v.* Sargent, 112 Ind. 484, 14 N. E. 466 (1887); Lewis *v.* Lewis, 58 Kan. 563, 564, 50 Pac. 454 (1897), *semble;* Spesard *v.* Spesard, 75 Kan. 87, 88 Pac. 576 (1907); and other Kansas decisions, Manitoba Mortgage, etc. Co. *v.* Daly, 10 Man. 425 (1895); McFadden *v.* Brandon, 8 Ont. L. Rep. 610 (C. A., 1904). And see Pierce *v.* Shaw, 51 Wis. 316, 8 N. W. 209 (1881), that if all the notes are accelerated, the first note does not have priority, but shares *pro rata*. If the note gives the holder an option, but the mortgage is absolute, the note will prevail. Kennedy *v.* Gibson, 68 Kan. 612, 75 Pac. 1044 (1904). And if the note is absolute, but the mortgage gives an option, the mortgage will prevail. Moline Plow Co. *v.* Webb, 141 U. S. 616 (1891).

Absolute effect was given to a simple contract for repayment of a loan. Hemp *v.* Garland, 4 Q. B. Rep. 519 (1843); Reeves *v.* Butcher, [1891] 2 Q. B. 509 (C. A.).

[64] Cases in note 63, except Hodge *v.* Wallace, Kelly *v.* Kershaw, and Pierce *v.* Shaw. 12 L. R. A. (N. S.), 1190, note; 51 L. R. A. (N. S.), 151, note.

[65] No authorities have been found, but the principle is clear.

[66] First National Bank *v.* Peck, 8 Kan. 660 (1871); Lewis *v.* Lewis, 58 Kan. 563, 564, 50 Pac. 454 (1897), *semble;* Hodge *v.* Wallace, 129 Wis. 84, 108 N. W. 212 (1906); Merchants' Bank *v.* Brisch, 154 Mo. App. 631, 136 S. W. 28 (1911). But in Re Goye & Co. [1900] 2 Ch. 149, it was held that where a debenture accelerated by winding-up of the corporation was negotiated thereafter, the purchaser was not subject to equities. The decision seems to rest on the express language of the instrument. *Cf.* Hynes *v.* Illinois Trust, 226 Ill. 95, 80 N. E. 753 (1907).

[67] Banzer *v.* Richter, 68 Misc. 192, 123 N. Y. Supp. 678 (1910); Kelly *v.* Kershaw, 5 Utah, 295, 14 Pac. 804 (1887).

[68] 5 M. & Sel. 282 (1816); see page, 761, *supra*.

bill of exchange is absolutely accelerated by nonacceptance; the holder has no option to waive the dishonor; yet the acceleration does not affect a subsequent purchaser ignorant of the nonacceptance. Therefore, the purchaser of an installment note after the date of one or more installments has passed should not be forced at his peril to inquire whether it has been dishonored, so long as he is without notice. Whether the absence of indorsements of payment on the instrument subjects him to notice will be considered presently.

Although some of the objections caused by uncertainty of time are thus absent from these instruments when construed as absolutely accelerated, the possible uncertainty of value may cause trouble. If the interest-rate is high, the instrument would normally command a premium, but a purchaser would not pay a business premium if the obligor can default an early installment of interest or principal, pay up in full next day, and deprive the holder forthwith of a supposedly long-time investment. The acceleration would be practically at the option of the obligor, who could take profitable advantage of his own wrong by cutting short his duty to pay high interest. One reply to this very serious objection is that the obligor is not necessarily wrongful. He may in fact have a defense to any and all liability on the instrument, and default the first payment of interest in order to bring the dispute to an early decision.[69] It is certainly a clumsy method of ascertaining rights; the law ought to allow the obligor to ask for a declaratory judgment as soon as the dispute arises,[70] without waiting till maturity, or having to break his contract and destroy the holder's investment. A much better reply is, that the holder need not lose his high interest in spite of the default. Suppose that an installment note provides for ten per cent interest, and the legal rate is six per cent. In some jurisdictions, interest continues to run at ten per cent after maturity until payment; [71] the holder could simply wait after default of the first installment, although the note then matured, and sue at the date originally fixed for the last installment, getting the

[69] San Antonio, etc. Association *v.* Stewart, 94 Texas, 441, 446, 61 S. W. 386 (1901).

[70] Edson R. Sunderland, "A Modern Evolution in Remedial Rights, — the Declaratory Judgment," 16 MICH. L. REV. 69, 77: "To use a homely figure, prior to 1883 the English courts were employed only as repair shops; since that time they have been operated as service stations."

[71] The authorities on both sides will be found in 1 SEDGWICK ON DAMAGES, 9 ed., § 325 *ff.*

interim ten per cent interest in his judgment. Even jurisdictions which ordinarily allow only the legal rate after maturity on the ground that the contract simply fixed a rate until maturity, ought in the installment cases to use the contract rate as the measure of damages, since the instrument provided for that rate until the maturity of the last installment. The loss of the stipulated high interest is an element of the damage caused by the maker's breach of contract which ought to be included in the judgment. The acceleration provision in installment notes is like a clause in a contract for the delivery of goods by installments, agreeing that on non-delivery of any installment, the whole contract may be canceled. The buyer can then recover for the loss of the future benefit which he would have received, if it had not been for the breach of contract.[72] If this reasoning be sound, the holder of the ten per cent note of which the first installment is defaulted will recover just as much interest in his judgment as he would have received if all installments had been regularly paid, subject of course to discount if the judgment is obtained before the date of the last installment. Consequently, he is not really deprived of his investment by the default, and the value of the note is certain. Therefore, automatic acceleration on default does not impair negotiability.

2. *Optional Acceleration on Default.* — The weight of authority and the better view construe the acceleration provision as giving the holder an option to declare the whole sum due, which he can exercise by demand, suit, foreclosure, and similar acts. Since the provision is primarily for his benefit, he can waive it if he wishes. Waiver may be shown by the subsequent acceptance of interest or by mere inaction. The obligor cannot take advantage of his own wrong and cause an automatic change of maturity, which would subject the paper to equitable defenses and start the Statute of Limitations running.[73] Such reading of an option into the instru-

[72] 2 SEDGWICK ON DAMAGES, 9 ed., § 636 *b;* Cherry Valley Iron Works *v.* Florence Iron River Co., 64 Fed. 567 (C. C. A., 6th, 1894). Another analogy is damage for failure to accept a draft: 2 SEDGWICK, *Ib.*, § 707.

[73] Chicago *v.* Merchants' Bank, 136 U. S. 268, 284 (1889), *semble;* Nebraska, etc. Bank *v.* Nebraska, etc. Co., 14 Fed. 763 (Neb. 1883); Gillette *v.* Hodge, 170 Fed. 313 (C. C. A. 8th, Minn., 1909); Belloc *v.* Davis, 38 Cal. 242 (1869); Watts *v.* Hoffman, 77 Ill. App. 411 (1898).

A similar provision in the mortgage was construed as giving only an option in Richardson *v.* Warner, 28 Fed. 343 (Neb. 1886); Keene Five Cent Savings Bank *v.* Reid, 123 Fed. 221 (C. C. A., 8th Kan., 1903), certiorari denied, 191 U. S. 567 (1903); Mason *v.*

ment is analogous to the interpretation of the usual clause in a lease, that the term shall cease and be absolutely determined or void upon a default in the payment of rent. It is well settled that the landlord waives the forfeiture by subsequent acceptance of rent, and that the tenant will not be allowed to say that he is discharged from his covenants by his own default, unless the landlord chooses to take advantage of the condition.[74] The word "void" in an insurance policy is also construed to render it voidable at the option of the insured. This construction of the acceleration clause reaches a just result. The interest and other terms of the loan are ordinarily arranged with reference to the normal life of the instrument with the expectation that the obligor will carry out his promises. The default clause does not give the obligor the right to break his contract. It is merely incidental to the main contract, affording the holder the right to take rapid action, at the first sign of trouble, to protect his entire investment instead of running future risks. He should be free to decide whether such protection is necessary under the circumstances of the default. Moreover, it is also for the benefit of the ordinary obligor to construe the provision as permissive and not mandatory. Extended credit has been given him because of his inability to pay in a short time from his usual resources. The dates for payment are adapted to his ability to pay. If every default automatically brings the whole loan down on his head at once, he will often be unable to remain solvent. The holder could not overlook even a slight delay of interest, but would

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Luce, 116 Cal. 232, 48 Pac. 72 (1897); Watts *v.* Creighton, 85 Iowa, 154, 52 N. W. 12 (1892); Lowenstein *v.* Phelan, 17 Neb. 429, 22 N. W. 561 (1885); Cox *v.* Kille, 50 N. J. Eq. 176, 24 Atl. 1032 (1892); Core *v.* Smith, 23 Okla. 909, 921, 102 Pac. 114 (1909); Batey *v.* Walter, 46 S. W. 1024 (Tenn., 1897); First National Bank *v.* Parker, 28 Wash. 234, 68 Pac. 756 (1902).

The holder's option need not be exercised immediately upon default. Wheeler *v.* Howard, 28 Fed. 741 (Mo. 1886). Bringing suit is exercise of the option without other notice to the debtor. Swearingen *v.* Lahner, 93 Iowa, 147, 61 N. W. 431 (1894); Coad *v.* Home Cattle Co., 32 Neb. 761, 769, 49 N. W. 757 (1891). It is held that even if foreclosure proceedings were instituted and then dismissed, maturity was not accelerated, and the Statute of Limitations did not begin to run. California Savings Soc. *v.* Culver, 127 Cal. 107, 59 Pac. 292 (1899).

The Federal courts need not follow state decisions on the application of the local Statute of Limitations to these instruments. Keene Five Cent Sav. Bank *v.* Reid, 123 Fed. 221 (C. C. A., 8th, Kan., 1903), certiorari denied, 191 U. S. 567 (1903); *contra*, Moline Plow Co. *v.* Webb, 141 U. S. 616, 625 (Texas, 1891), *semble*.

[74] Belloc *v.* Davis, 38 Cal. 242, 250 (1869); Rede *v.* Farr, 6 M. & S. 121 (1817).

have to enforce the instrument in order to charge secondary parties and avoid the Statute of Limitations. Leniency now might be unexpectedly used against him years hence, unless the law permits it.[75] Consequently, the provision should be construed as optional. If the acceleration clause is impliedly or expressly optional, the time or times for payment remain as fixed by the instrument despite the default, unless the holder exercises his option. Therefore, the obligor cannot pay up the whole amount of the instrument at once against the holder's consent; [76] and the Statute of Limitations does not begin to run until the date fixed.[77] And the rules as to equitable defenses and notice to secondary parties are in this situation the same as if no acceleration clause existed.

At this point, however, special difficulties arise with installment paper. If a note is payable in several installments without any acceleration provision, and one installment is known to be overdue, then a purchaser, though ignorant of equitable defenses, will be barred by such a defense from recovering subsequent installments,[78] because he had ground to suspect some valid reason for the default. If due notice of the dishonor was not given to indorsers, this is an equitable defense which would prevent the purchaser who knew of the dishonor from charging them at all.[79] Therefore an installment note with an acceleration provision is in these respects overdue on default, even though the option has not been exercised, and a holder with notice of the default is affected.[80] The same result would follow if the option had been exercised, and a subsequent purchaser knew of the default, but not of the holder's election. In all these situations, the holder must have notice of the default. The absence of any indorsement on the instrument that installments have been paid is not *per se* notice and does not subject a

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[75] Belloc *v.* Davis, 38 Cal. 242, 249 (1869); Lowenstein *v.* Phelan, 17 Neb. 429, 431, 22 N. W. 561 (1885).

[76] Cox *v.* Kille, 50 N. J. Eq. 176, 24 Atl. 1032 (1892).

[77] See the cases in note 73, *supra*, except Cox *v.* Kille; and also Kennedy *v.* Gibson, 68 Kan. 612, 617, 75 Pac. 1044 (1904), *semble.*

The authorities are reviewed in notes in 12 L. R. A. (N. S.), 1190; 51 L. R. A. (N. S.), 151.

[78] Vinton *v.* King, 4 All. (Mass.) 562 (1862).

[79] Noell *v.* Gaines, 68 Mo. 649 (1878). This would also follow from the analogy of nonacceptance of bills of exchange. Whitehead *v.* Walker, 9 M. & W. 506 (1842).

[80] Hall *v.* Wells, 24 Cal. App. Rep. 238 (1914).

purchaser to equities. It is, however, evidence of notice.[81] Payment of a price large enough to include the defaulted installment would also be evidence.

Therefore, known default, regardless of the holder's option, is enough to render an installment instrument completely overdue for purposes of equitable defenses and charging indorsers, though not for tender of payment and the Statute of Limitations. The reason is, that the default is at a maturity, for the instrument has several maturities. The earlier maturity does not result from acceleration; it is already there, specified by the language of the instrument. This distinguishes the installment type of acceleration provision from all the others considered in this article.

The same principle applies to a series of notes which show on their face that they are part of the same transaction,[82] but not to instruments which are accelerated by default of interest.[83] Failure to pay interest is as likely to result from temporary embarrassment as from an equitable defense; it does not entitle indorsers to notice; and therefore it is not equivalent to a dishonor for purposes of letting in equities.[84]

It is hardly necessary to state that a holder without notice of either default or exercise of the option is not affected by the acceleration provision.[85]

Acceleration by an Extrinsic Fact

Another type of acceleration clause provides for payment at a stated day or sooner upon the happening of an event entirely distinct from the collection of the instrument. Examples are: "ninety days after sight, or when realized"; [86] "in twelve months, or before

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[81] National Bank of North America *v.* Kirby, 108 Mass. 497 (1871); Taylor *v.* American National Bank, 63 Fla. 631, 649, 57 So. 678 (1912); McCorkle *v.* Miller, 64 Mo. App. 153 (1895); Gillette *v.* Hodge, 170 Fed. 313 (C. C. A. 8th, 1909).

[82] 25 Harv. L. Rev. 286 collects the cases. The principle is the same whether the acceleration provision is present or not.

[83] Gillette *v.* Hodge, 170 Fed. 313 (C. C. A. 8th, 1909).

[84] Cromwell *v.* Sac County, 96 U. S. 51 (1877); the authorities are collected in 8 Corpus Juris, 478, which cites a few cases *contra*.

[85] Lowenstein *v.* Phelan, 17 Neb. 429, 431, 22 N. W. 561 (1885); Core *v.* Smith, 23 Okla. 909, 924, 102 Pac. 114 (1909), *semble;* Gillette *v.* Hodge, 170 Fed. 313 (C. C. A. 8th, 1909).

[86] Held bad in Alexander *v.* Thomas, 16 Q. B. 333 (1851).

if made out of the sale of a machine";[87] "one year after date . . . this to be paid when any dividends shall be declared on . . . shares";[88] "Dec. 1, 1905; if crop . . . is below 8 bushels per acre this note shall be extended one year."[89] If such a clause clearly does no more than give the maker a limited option to accelerate payment, then it is like the cases which permit him to pay a note off on any interest date. However, most of these instruments must be construed as making the instrument automatically due, if the machine is sold or the dividends declared or the crop sufficiently large, etc. Such instruments are not suitable for circulation. They violate the first principle of this article, because maturity is fixed by an act not incidental to the collection of the instrument. The "on or before" and installment cases do involve such an incidental act. Here we cannot say that there is a principal maturity with acceleration as an optional means of enforcing the principal obligation. There are two maturities of coequal importance, and one of them is uncertain and could not stand alone. The holder is under no duty to inquire into dishonor by nonacceptance or refusal to pay on demand, but here is an outside fact which obviously affects payment. Since purchasers of negotiable paper should not be required to investigate outside facts, these instruments are not properly negotiable. Also the value is speculative, for no one can tell in advance whether the contingent event will occur, yet if it does the investment is destroyed.

Such an instrument has consequently been held in England not to be a valid note,[90] but numerous decisions in this country repudiate the English case and uphold negotiability.[91]

The Negotiable Instruments Law provides that "instruments payable on or before a fixed or determinable future time specified therein" are negotiable.[92] It has been held in Iowa that this validates acceleration by a contingent event,[93] since the instrument is payable

[87] Held good in Ernst *v.* Steckman, 74 Pa. St. 13 (1873); Cisne *v.* Chidester, 85 Ill. 523 (1877); Charlton *v.* Reed, 61 Ia. 166, 16 N. W. 64 (1883).

[88] Held bad in Brooks *v.* Hargreaves, 21 Mich. 254 (1870).

[89] Held good in State Bank of Halstad *v.* Bilstad, 136 N. W. 204 (Iowa, 1912, N. I. L.)

[90] Alexander *v.* Thomas, 16 Q. B. 333 (1851).

[91] Cases in the preceding notes; and those collected in 1 DANIEL, NEGOTIABLE INSTRUMENTS, § 43 *ff.;* 8 CORPUS JURIS, 138, note 75. See, also, Van Arsdale-Osborne Brokerage Co. *v.* Martin, 81 Kan. 499, 106 Pac. 42 (1910).

[92] § 4 (2).

[93] State Bank of Halstad *v.* Bilstad, 136 N. W. 204 (Iowa, 1912). *Contra,* Bright *v.* Offield, 81 Wash. 442, 448, 143 Pac. 159, 162 (1914, N. I. L.).

either on a fixed day or before it. By this argument any acceleration provision would be valid, yet, as we shall see, many such provisions are held invalid under the Act, and the Iowa court itself has construed the Act to forbid a chattel note with an acceleration provision, because of uncertainty in time.[94] It seems impossible that the Act would be held to permit notes payable "in one hundred years or sooner when the peace conference is over"; "in twenty years or when an aëroplane crosses the Atlantic." This clause of the Act must be restricted to instruments which are literally payable "on or before" a day without further contingencies, so that the holder or maker accelerates by his election; or else we must construe the clause in the light of the law merchant to include other acts of acceleration, if they are business acts incidental to the collection of the instrument. The clause cannot authorize uncommercial acts of acceleration. Indeed, the instruments just considered bear the aspect of agricultural paper rather than commercial. They are open to all the objections which can be urged against notes payable on a contingency without any fixed time limit. They ought to be regarded as simple contracts for the repayment of a loan on peculiar conditions, and not as paper to circulate as a substitute for money.

Judgment Notes

Notes authorizing any attorney of record to confess judgment on behalf of the maker if he does not pay at maturity are negotiable, both at common law [95] and under the Negotiable Instruments Law.[96] However, if judgment can be confessed before maturity, negotiability is denied by decisions before [97] and after the Act.[98] A confession of judgment before maturity does not accelerate payment in some states.[99] It simply gives the holder an immediate judgment lien, which can be enforced by execution after maturity. In other

[94] Iowa National Bank *v.* Carter, 144 Iowa, 715, 123 N. W. 237 (1909).

[95] The cases are collected in 8 Corpus Juris, 128.

[96] § 5 (2).

[97] Overton *v.* Tyler, 3 Pa. 346 (1846), is the leading case. Richards *v.* Barlow, 140 Mass. 218, 6 N. E. 68 (1885), *accord*, is based on the old Massachusetts rule against acceleration provisions.

[98] Milton National Bank *v.* Beaver, 25 Pa. Sup. Ct. 494 (1904); First National Bank of Elgin, Illinois *v.* Russell, 124 Tenn. 618, 139 S. W. 734 (1911); Wisconsin Yearly Meeting *v.* Babler, 115 Wis. 289, 91 N. W. 678 (1902).

See other citations in 8 Corpus Juris, 128.

[99] Overton *v.* Tyler, *supra*.

states, execution can be levied at once.[100] In any case the note is changed before maturity into a non-negotiable judgment.[101] Is this rightly held to make the note itself non-negotiable? The decisions to that effect have been vigorously attacked.[102]

The fact that an obligation may become non-negotiable does not necessarily prevent negotiability at the outset. A restrictive indorsement, like "Pay A only," may prohibit the further negotiation of a negotiable note.[103] Acceleration by conversion into stock before maturity is analogous to conversion into a judgment, and is always held unobjectionable, as we have seen.[104] There are two distinctions, however, which will perhaps account for the failure to apply the analogy. When a note is exchanged for stock it is surrendered to the obligor and safely out of circulation, in the hands of the man who is most interested in canceling it. If judgment is entered on a note before maturity, the note will perhaps have to be filed with the clerk of court (this depends upon local rules), but it is not in the custody of the obligor. Access to records is easy, and the note may get out and into the hands of a *bonâ fide* purchaser without notice, so that the obligor would have to pay twice. However, this objection applies to notes payable on or before a fixed date at the option of the holder in whole or in part, which are held negotiable,[105] although a maker who had paid a large part to the payee might have to pay over again in full to an innocent indorsee. A further peculiarity of these judgment notes is that they oust the courts of jurisdiction, and, therefore, like arbitration agreements are regarded jealously and tied down within narrow limits.

Acceleration if the Holder Deems himself Insecure

In view of the liberal attitude taken by the courts towards the acceleration provisions already considered, especially those dependent upon an outside fact, a note, payable at a fixed date or sooner "on demand at the option of the holder if he deems himself insecure"

[100] First National Bank of Elgin, Illinois *v.* Russell, *supra.*

[101] See "Are Judgments Quasi Negotiable?" Roscoe Pound, 43 Cent. L. J. 440 (1896).

[102] In the pamphlet, *Some Observations on the Negotiable Instruments Act,* William Trickett, Carlisle, Pa., 1916.

[103] N. I. L. § 36.

[104] N. I. L. § 5 (4); and *supra,* pages 762-63.

[105] See *supra,* notes 46, 47, and *infra,* note 108.

should create no difficulty. Such instruments simply express more fully the effect of paper payable on or before a fixed date at the option of the holder, which is clearly negotiable. It may be argued that the holder's insecurity is an objective fact which must be proved to accelerate payment. However, the phrase seems mere encouragement, and he can exercise his option to demand payment whether he really feels insecure or not. The point is, that insecurity is the usual state of mind accompanying a demand by the holder before maturity, and so is naturally written in here. And even if actual insecurity is necessary, it is not an extrinsic fact which the holder needs to investigate in order to determine whether he can exercise his option. Subsequent purchasers need not inquire about the exercise of the option if they have no notice that it was exercised, for it is incidental, and the analogy of *Dunn* v. *O'Keefe*[106] once more applies. However construed, the instrument is suitable for circulation, more so than the ordinary note without an acceleration clause. The value is certain, and even the danger of insolvency is to some extent overcome.

Yet the decisions at common law and under the act are almost unanimous against the negotiability of an instrument with this provision.[107] The argument from common-law principles is that the valid acceleration provisions give the maker some share in the acceleration. Either the note is payable "on or before" a date at his option, or else it is due upon his default in the installment and similar cases. The holder may have an option too in the installment cases, but the maker must do something first. Here the time of payment is dependent entirely upon the option of the holder. This distinction seems to me purely technical, especially when the maker's part consists in a breach of contract. There is no reason

[106] 5 M. & S. 282 (1816). See page 761, *supra*.

[107] Some of the following cases involved "chattel notes," and are indicated by *ch.* Kimpton *v.* Studebaker, 14 Idaho 552, 94 Pac. 1039 (1908, N. I. L.) *ch. semble;* Smith *v.* Marland, 59 Iowa, 645, 13 N. W. 852 (1882); Iowa National Bank *v.* Carter, 144 Iowa 715, 123 N. W. 237 (1909, N. I. L.) *ch.*; but *cf.* State Bank of Halstad *v.* Bilstad, 136 N. W. 204 (Iowa, 1912, N. I. L.); Third National Bank *v.* Armstrong, 25 Minn. 530 (1879) *ch. semble;* First National Bank of New Windsor *v.* Bynum, 84 N. C. 24 (1881); Reynolds *v.* Vint, 73 Ore. 528, 144 Pac. 526 (1914, N. I. L.) *ch.*; Carroll, etc. Bank *v.* Strother, 28 S. C. 504, 6 S. E. 313 (1887) *ch.*; Bright *v.* Offield, 81 Wash. 442, 450, 143 Pac. 159, 162 (1914, N. I. L.), *semble;* Puget Sound State Bank *v.* Paving Co., 94 Wash. 504, 162 Pac. 870 (1917, N. I. L.), approved in 15 MICH. L. REV. 512. See, also, 35 L. R. A. (N. S.), 392, note. *Contra,* Heard *v.* Dubuque County Bank, 8 Neb. 10 (1878).

why the holder should not have an option as well as the maker. In either situation, the acceleration is incidental and should not affect an innocent purchaser. (Even if my third principle is rejected with its *Dunn* v. *O'Keefe* analogy, the inquiry into whether a demand has already been made is much less objectionable than an inquiry whether the maker's father has died, or a machine has been sold. Yet such inquiries into outside facts are permitted by the courts, while a fact in the course of collection of the instrument is held fatal.) Furthermore, the authorities allow an option by the holder to accelerate payment on other instruments.[108] In an ordinary demand note the time of payment is entirely within his control. It is plain that the judgment note cases are too peculiar to have any bearing on this matter of holder's option.

The Negotiable Instruments Law with its general "on or before" clause [109] certainly seems to settle this point and allow the holder an option, but the decisions since the Act continue to argue that the "insecure" clause makes the "time of payment . . . dependent absolutely upon the will and election of the payee" and "'dependent on the future volition of' one other than the maker." [110] Therefore it is said to be "payable upon a contingency" [111] and invalid under the last sentence of section four.[112] That sentence has no proper application to these instruments, which fall within subdivision two of the same section.[113]

The decisions are particularly unfortunate in view of their effect upon the form of note sometimes used by savings banks, which fixes a date for payment and adds, "with the understanding that the said Bank may at any time before the expiration of said term call for the payment of the whole or any portion of said money, provided

[108] See notes 46 and 47, *supra*. To these may be added cases of a note payable in such installments as the holder may demand, where the time of payment is entirely within his control, and yet is held certain. White *v.* Smith, 77 Ill. 351 (1875); Stillwell *v.* Craig, 58 Mo. 24 (1874); President, etc. of the Goshen, etc. Turnpike Road *v.* Hurtin, 9 Johns. (N. Y.) 217 (1812); Washington County Mutual Insurance Co. *v.* Miller, 26 Vt. 77 (1853).

[109] § 4 (2), see note 113, *infra*.

[110] Puget Sound State Bank *v.* Washington Paving Co., 94 Wash. 504, 515, 162 Pac. 870 (1917).

[111] *Ibid.*, 511; Iowa National Bank *v.* Carter, 144 Iowa, 715, 123 N. W. 237, 241 (1909).

[112] "An instrument payable upon a contingency is not negotiable."

[113] This allows instruments "payable . . . on or before a fixed . . . time."

the same is wanted to pay depositors." [114] If the hostile attitude toward holder's option is maintained, such a note would not be negotiable.

CHATTEL NOTES

The nature of these instruments and the form of the acceleration provision has already been discussed.[115] The effect is to give the holder a mortgage upon a chattel in the possession of the vendee as security for the note, and to accelerate payment if the maker does any specified acts which endanger the mortgage lien, such as sale, removal, or suffering a levy of execution. Very often the holder is expressly given an option to take advantage of the maker's act, but such an option is to be implied in any case since the clause is clearly for his protection, if he thinks he needs it. The maker should not be regarded as having an option to accelerate payment by his own clear misconduct. Sometimes the holder is authorized to seize and sell the collateral, applying the proceeds upon the note, and being able to sue for the deficiency at once. Although, unlike the "insecure" cases, the maker does participate in the acceleration, it is clear that acceleration by this kind of option is more difficult to uphold than that in the installment cases when the holder merely sues. It is also clear that the maker's act is less closely connected with the collection of the instrument than in the installment and other cases, where default of payment brings the acceleration provision into play. Consequently, it is harder to bring these notes within the first principle of this article, and say that the act of acceleration is incident to the collection of the instrument. Other questions arise as to the rights of subsequent purchasers. If the holder can make the note due at once by seizure of a chattel, extrinsic evidence is necessary to prove whether the chattel has been seized or not. Therefore, if the purchaser is bound to inquire whether there has been acceleration, he will have to go into extrinsic evidence.

Therefore, by the weight of authority these acceleration provisions are held to impair negotiability, as rendering the time uncertain and containing promises about the chattel which are "in addition to the payment of money." [116] The time is said to be uncertain

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[114] This form is used by the Boston Five Cent Savings Bank.

[115] Page 749, *supra*.

[116] Kimpton *v.* Studebaker, 14 Idaho, 552, 94 Pac. 1039 (1908, N. I. L.); Iowa Na-

because it is dependent upon the fact of whether the maker does sell or remove the chattel. The cases also show traces of a hostility to all chattel notes, with or without the acceleration provision.[117]

After considerable questioning, I have come to the conclusion that these notes are negotiable. The reasons for this view are like those presented in the discussion of the next topic on collateral, that the maker's promises and the breach are really incidental to the collection of the instrument because of the importance of the security. A few cases take the same position.[118]

A somewhat similar question arises with notes secured by a real-estate mortgage, which provides that if the maker shall do any act by which the value of the mortgaged property shall be impaired, the whole amount shall become due and payable. This would include suffering or committing waste, failing to keep up insurance, and so forth. Such a note has been held invalid in Washington,[119] but is regarded as valid in other decisions.[120]

Acceleration by Depreciation or Sale of Collateral

This brings us at last to the validity of the provisions in the promissory note described on the first page of this article.[121] The problem is closely related to that of chattel notes. The provisions are frequently contained in the notes, secured by collateral, which banks require borrowers to sign. Some of these notes allow the holder to sell the collateral at once if it depreciates and sue forthwith for the deficiency, without giving the maker an opportunity to furnish more margin.[122] Others agree to deliver more collateral

tional Bank *v.* Carter, 144 Iowa, 715, 123 N. W. 237 (1909, N. I. L.); but see State Bank of Halstad *v.* Bilstad, 136 N. W. 204 (Iowa, 1912, N. I. L.); First National Bank *v.* Carson, 60 Mich. 432, 27 N. W. 589 (1886), probably overruled by Schmidt *v.* Pegg, 172 Mich. 159, 137 N. W. 524 (1912, N. I. L.); Third National Bank *v.* Armstrong, 25 Minn. 530 (1879), *semble;* Reynolds *v.* Vint, 73 Ore. 528, 144 Pac. 526 (1914, N. I. L.); Carroll, etc. Bank *v.* Strother, 28 S. C. 504, 6 S. E. 313 (1887); Kimball *v.* Mellon, 80 Wis. 133, 48 N. W. 1100 (1891), resting chiefly on other grounds. See 35 L. R. A. (N. S.), 392, note; L. R. A. 1915 B, 473, note.

117 See note 3, *supra.*

118 Schmidt *v.* Pegg, 172 Mich. 159, 137 N. W. 524 (1912, N. I. L.), probably overruling First National Bank *v.* Carson, 60 Mich. 432 (1886); Heard *v.* Dubuque, 8 Neb. 10 (1878); Joergensen *v.* Joergenson, 28 Wash. 477, 68 Pac. 913 (1902).

119 Bright *v.* Offield, 81 Wash. 442, 143 Pac. 159 (1914, N. I. L.).

120 See note 151, *infra.*

121 Page 747, *supra.*

122 See Mumford *v.* Tolman; Benny *v.* Dunn; Continental National Bank *v.* McGeoch; all *infra*, notes 126 to 128.

to the satisfaction of the holder when demanded; on failure to do so the note matures at once, and the holder may exercise his power of sale if he desires.[123] Occasionally, the maker is given the option of paying something on account instead of furnishing more security.[124] Sometimes, the note provides that the collateral also secures any other obligation of the maker due to the payee, or even of any firm of which he is a member. The peculiar acceleration provisions of the obligations of the National Salt Company will be discussed later.[125]

The weight of authority holds these provisions for acceleration by depreciation of collateral to be fatal to negotiability, whether accompanied by a promise to furnish more collateral[126] or not.[127] There is, however, good authority in favor of negotiability.[128]

The provisions are said to violate three formal requisites: certainty of amount, certainty of time, and the rule against a promise to do anything but pay money. Let us consider these in turn, remembering, as we do so, the words of Judge Barclay of Missouri:[129]

[123] Lincoln *v.* Perry; Commercial National Bank *v.* Consumers' Brewing Co.; Holliday *v.* Hoffman; Hibernia Bank *v.* Dresser; Kennedy *v.* Broderick; Finley *v.* Smith; all *infra*, notes 126 to 128.

[124] Commercial National Bank *v.* Consumers' Brewing Co., *infra*, note 126.

[125] In note 156.

[126] Lincoln *v.* Perry, 66 Fed. 887 (C. C. A. 8th, 1895); Commercial National Bank *v.* Consumers' Brewing Co., 16 App. D. C. 186 (1900); Strickland *v.* National Salt Co., 79 N. J. Eq. 182, 81 Atl. 828 (1911); National Salt *v.* Ingraham, 122 Fed. 40 (C. C. A. 2d, 1903); but see National Salt Co. *v.* Ingraham, 143 Fed. 805 (C. C. A. 2d, 1906); Holliday *v.* Hoffman, 85 Kan. 71, 116 Pac. 239 (1911, N. I. L.); Hibernia Bank *v.* Dresser, 132 La. 532, 538, 61 So. 561 (1913, N. I. L.).

[127] Benny *v.* Dunn, 26 Pitts. Leg. J. (N. S.), 382, 2 Lack. Leg. N. 135 (1896), probably overruled by 260 Pa. 255, see note 128; Continental National Bank *v.* McGeoch, 73 Wis. 332, 41 N. W. 409 (1889). But see Commercial National Bank *v.* Consumers' Brewing Co., 16 App. D. C. 186, 203 (1900), *semble*.

And several of the chattel notes held invalid allowed the holder to seize and sell the chattel before maturity, and sue for the deficiency, *e. g.*, Smith *v.* Marland, 59 Iowa, 645, 13 N. W. 852 (1882); Kimpton *v.* Studebaker, 14 Idaho, 552, 94 Pac. 1039 (1908, N. I. L.). South Bend Iron Works *v.* Paddock, 37 Kan. 510, 15 Pac. 574 (1887); but Iowa distinguishes a note allowing the holder to seize the chattel if he deems himself insecure, but not permitting sale till maturity. Bank of Carroll *v.* Taylor, 67 Iowa 572, 25 N. W. 810 (1885). See notes in 35 L. R. A. (N. S.), 392, and L. R. A. 1915 B, 473.

[128] National Salt Co. *v.* Ingraham, 143 Fed. 805 (C. C. A., 2d, 1906); Kennedy *v.* Broderick, 216 Fed. 137 (C. C. A. 7th, 1914, N. I. L.), — if in the judgment of the holder collateral depreciates and new collateral is not delivered on demand, note matures at once; Finley *v.* Smith, 165 Ky. 445, 177 S. W. 262 (1915); Mumford *v.* Tolman, 54 Ill. App. 471 (1894), 157 Ill. 258, 41 N. E. 617 (1895); Empire Nat. Bank *v.* High Grade Oil Refining Co., 260 Pa. 255, 103 Atl. 602 (1918).

[129] First National Bank of Springfield, Ohio *v.* Skeen, 101 Mo. 683, 687, 14 S. W. 732 (1890).

"The law governing such paper is the outgrowth of the usages of commerce. In determining disputed questions in its application it is often useful to recur to the objects and purposes of the law and to observe how far they may be promoted or defeated by the acceptance of any proposed construction of it. The reason of any law is its life, and a correct conception of its reason is oftentimes essential to a proper understanding of the meaning and tendency of the law itself."

The real question, therefore, is not whether a formal requisite is violated in theory, but whether it is violated in such a way as to raise serious objections; whether the acceleration provisions render the instrument more or less suitable for circulation among business men as a substitute for money.

Uncertainty of Amount. — If the holder is authorized to sell the collateral before maturity, he must properly apply the proceeds of the sale toward the debt. Only the balance is then recoverable, and it is uncertain what that balance will be. The amount payable by the maker, either under a judgment or otherwise, is therefore said to be uncertain.[130] A further uncertainty is created by words authorizing the holder to pay all expenses of the sale out of its proceeds.[131]

A similar uncertainty as to the size of the deficiency is caused by a power to sell collateral at maturity, yet this is clearly valid.[132] A distinction has been suggested in that the power to sell after maturity operates when the instrument has become "an ordinary contract for the payment of money" subject to equities, while the power to sell before maturity operates while the bill has negotiable privilege and value.[133] This distinction overlooks the point, that the acceleration does cause maturity and render the note overdue as to persons with notice that it has occurred. Also, if the note mentions the collateral, all purchasers are put on notice that the collateral should accompany the note,[134] and, if it is missing, that it has been sold. A prior holder could have sold it anyway without express power to do so — a wrongful act, of course, but affecting a later purchaser with notice of the existence of the collateral and not

[130] Lincoln National Bank *v.* Perry, 66 Fed. 887, 892 (1895); Continental National Bank *v.* McGeoch, 73 Wis. 332, 337, 41 N. W. 409 (1889).

[131] Continental National Bank *v.* McGeoch, 73 Wis. 332, 338, 41 N. W. 409 (1889).

[132] Arnold *v.* Rock River, etc. R. R. Co., 5 Duer (N. Y.) 207 (1856); N. I. L. § 5 (1).

[133] Commercial National Bank *v.* Consumers' Brewing Co., 16 App. D. C. 186, 203 (1900).

[134] Holmes *v.* Kidd, 3 H. & N. 891 (1858).

impairing negotiability. There is no reason why the expression of the power should alter the result. In other words, sale before maturity has the same practical effect upon later purchasers as sale after maturity.

If the note provides that the collateral also secures other obligations,[135] then it may be that the absence of any collateral attached to the instrument would not be suspicious and would not throw a duty upon the purchaser to find out what had become of the collateral. Consequently, even though a prior holder had sold the collateral and applied the proceeds upon this very note, a subsequent purchaser ignorant of the rule would be able to recover in full. This is hard upon the maker, but ought not to prove fatal to negotiability. The same hardship might result in notes which give the maker or the holder an option for payment of the principal in parts before maturity. Such part payments would not affect a subsequent *bonâ fide* purchaser. Yet, as we have seen, such instruments are negotiable.[136]

The obligation of the maker to pay the expenses of sale does not create objectionable uncertainty in amount. The sum which the holder of the note at the time of the sale receives is not rendered uncertain, for he obtains only the face of the note. Indeed, the clause makes the value of the note more certain, for it is not liable to diminution by unforeseen expenses. It is indeed true that the maker will pay more than the face of the note, but this also happens if he agrees to pay exchange or attorney's fees, yet such agreements do not impair commercial certainty.[137]

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[135] Held fatal to negotiability, as an order to do an act in addition to the payment of money; and as showing an intention not to have the note transferable, since this promise runs to the payee alone. Hibernia Bank *v.* Dresser, 132 La. 532, 543, 61 So. 561 (1913). *Contra*, Commercial Bank of Selma *v.* Crenshaw, 103 Ala. 497, 15 So. 741 (1893); Empire Nat. Bank *v.* High Grade Oil Refining Co., 260 Pa. 255, 103 Atl. 602 (1918). Difficult questions might arise about priority as to the collateral, should the payee hold several notes, and transfer them to different persons; but these might also arise if the agreement were oral and not on the instrument. This particular provision should not defeat negotiability, if the acceleration provisions do not. It does not *per se* put a purchaser on inquiry. For recent cases on such provisions see Torrance *v.* Third National Bank, 210 Fed. 806 (C. C. A. 3d, 1914); Mulert *v.* National Bank of Tarentum, 210 Fed. 857 (C. C. A. 3d, 1913).

[136] This analogy is pointed out in Commercial National Bank *v.* Consumers' Brewing Co., 16 App. D. C. 186, 203 (1900). See pages 759 and 761, note 47, *supra*.

[137] N. I. L. § 2; Cudahy *v.* Bank, 134 Fed. 538 (C. C. A. 8th, 1904), quoted on page 751, *supra*.

In short, the provisions for a speedy sale of collateral do not create uncertainty in amount, but make it more certain that the holder will receive the full face value of the instrument, without reduction by either the insolvency of the maker, or the depreciation of the collateral, or the cost of collection.

Uncertainty in Time. — The acceleration provisions in these collateral notes do undoubtedly render the time of payment uncertain, but not more so than the other types of provisions already considered. It is objected that a note "which carries with it the probability, or even the possibility, that it may be partially or wholly extinguished before maturity" is not suitable for negotiation.[138] Every "on or before" note, every installment note which falls due at once upon default, every note which gives the holder or maker an option to make part payments is open to just the same objection. This argument would wipe out acceleration provisions altogether.

Another objection advanced to these collateral notes is that the acceleration is not caused by the maker, but "there is an uncertainty in the time of payment within the determination of the payee or his assignee." [139] This attempted distinction between holder's option and maker's option has already been considered,[140] and found to be baseless. Also, the instrument in question "is no more uncertain for practical purposes than a bill drawn, for example, 'at sight,' or 'on demand,' neither of which phrases has ever been held to diminish negotiability. Yet, with regard to bills so drawn, the holder exercises the unquestioned option of fixing the time when the direction to pay becomes absolute." [141] And, finally, the maker does participate in the acceleration in these collateral notes by his refusal to furnish more collateral, so that they would seem analogous to installment notes which are accelerated at the option of the holder after default by the maker. It may be argued, however, that the analogy is not sound, because the holder has unlimited discretion to determine when the security has depreciated, so that for all practical purposes maturity is within his sole

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138 Thayer, J., in Lincoln National Bank *v.* Perry, 66 Fed. 887, 893 (C. C. A. 8th, 1895).

139 Benny *v.* Dunn, 26 Pitts. Leg. J. 382, 384 (1896).

140 See page 774, *supra*.

141 Barclay, J., in First National Bank *v.* Skeen, 101 Mo. 683, 688, 14 S. W. 732 (1890).

control.[142] The general law as to drastic pledge agreements, however, requires the pledgee to act in good faith for the pledgor's benefit as well as his own,[143] so that a dishonest or wholly unreasonable determination that the security is depreciating or that the additional security is not satisfactory would not seem to bring about an acceleration which would have any legal consequences. Therefore, it seems incorrect [144] to say that the holder has arbitrary power to cause acceleration. The power is given him for the purpose of making payment as certain as possible, and not for oppressing the maker.

There are difficulties about certainty of time which are not raised by the cases to which we will return later.

Furnishing More Collateral as an Additional Promise. — A third formal requisite which is said in several decisions [145] to be violated by these collateral notes is the rule that a negotiable instrument must not contain an order or promise to do an act in addition to the payment of money. This is said to be the most serious objection to these collateral notes. One decision which was disposed to regard such a note as sufficiently certain in time and amount held it not negotiable, because of this power to demand more collateral and sell upon default.

> "The power here conferred is so uncontrolled and uncertain, and its exercise so completely subject to the contingencies of every passing hour from and after the very moment of execution and delivery, that . . . it . . . ought not to be sanctioned." [146]

Another court says of this acceleration provision,

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[142] Benny *v.* Dunn, *supra.*

[143] See the article on "Drastic Pledge Agreements," Murray Seasongood, 29 HARV. L. REV. 277 (1916), which discusses many problems about these collateral notes outside the scope of my article.

[144] As in Holliday Bank *v.* Hoffman, 85 Kan. 71, 77, 116 Pac. 239 (1911, N. I. L.).

[145] See Commercial National Bank *v.* Consumers' Brewing Co., 16 App. D. C. 186, 204 (1900); Holliday Bank *v.* Hoffman, 85 Kan. 71 (1911, N. I. L.); Strickland *v.* National Salt Co., 79 N. J. Eq. 182, 188, 81 Atl. 828 (1911); and the chattel note cases.

[146] Commercial National Bank *v.* Consumers' Brewing Co., *supra,* 204, 206. A special feature of the note in that case was that a third person was made the depositary of the collateral, and was given the power to decide when there was depreciation in its value, and what additional security or payments on account in lieu thereof were required. It would seem that it is fairer to the maker to give the power to a disinterested bank than to the holder of the note. The trustee of a corporate mortgage occupies an analogous position.

"It would hardly be different if the note recited that it was secured by a chattel mortgage upon certain live stock and contained an agreement that in case their value should depreciate and the holder should deem the security insufficient the maker would on demand execute and deliver to the holder a mortgage upon certain real estate for such amount as would satisfy the holder, and that otherwise the note should mature at once." [147]

The installment notes are distinguished because there the acceleration is by the maker's failure to pay money, here to do something else.[148] Negotiable instruments are intended as a substitute for money, but here is a contract to deliver things, which is therefore considered to be a very different affair.

Nevertheless, it is well to remember that negotiable instruments do sometimes contain promises to do something else besides pay money. For instance, the maker may agree to let the holder sell the collateral, or to authorize any attorney of a court of record to enter judgment against him, or to deliver certificates of stock in exchange for the instrument.[149] In many jurisdictions he may agree to allow the legal title of a chattel to remain in the holder until payment of the instrument.[150] Some of these allowable promises are enforceable only at maturity, but not all. It is just the same sort of act, for instance, to deliver stock in exchange for a note as to deliver more stock to secure it. If one can be done before maturity, why not the other? The question in every case is not whether the act is technically "additional" to the payment of money, but whether it is substantially so. If its real purpose is to aid the holder to secure the payment of money and protect him from the risks of insolvency, if it steadies the value of the note, and makes it circulate more readily, then it should not be fatal to negotiability.

The promise to furnish more collateral is, it seems to me, such an incidental promise. The holder does not receive this collateral to keep after the instrument is paid. He gets it so as to be more certain that the instrument will be paid, to make assurance doubly sure. Both the old and the new collateral must be surrendered

[147] Holliday Bank *v.* Hoffman, *supra*, 75.

[148] *Ibid.*, 77.

[149] N. I. L., § 5. The well-known common-law cases have already been discussed. They will be found in 1 AMES, CASES ON BILLS AND NOTES, Chap. I, Sec. V.

[150] See note 3, *supra*.

when payment is received. If promises relating to the original security, *e. g.*, power of sale at maturity or reservation of title, are allowable, why not a promise to supplement that security and enable it to fulfill its essential purpose of covering the amount of the note?

The question whether the promise is enforceable before maturity does not determine whether it is additional, but only whether it renders the time uncertain, an independent problem already considered. A promise to furnish collateral at issue of the instrument may be included in it. Why not a promise to furnish it between issue and maturity? Such a promise for continued adequacy of the security is supported by authority, for example, a promise to insure mortgaged property or keep it free from waste,[151] or even to mortgage future crops.[152] Therefore, the formal requisite as to additional promises is not violated by a collateral note.

A strong argument for this view is made by Judge Baker in the United States Circuit Court of Appeals for the Seventh Circuit: [153]

"Two separate and distinct matters are involved. Each is to be considered and interpreted as a complete entity, whether they be written upon one paper or several. An unconditional promise to pay a certain sum at a certain time is a matter apart from security by way of deed of trust or mortgage of land or pledge or mortgage of chattels. One is governed by the law merchant, the other by property laws. The owner may rely, if he chooses, exclusively upon the promise to pay, according to its terms. Conditions for his benefit in the mortgage or pledge agreement may be availed of only in his capacity of mortgagee or pledgee; they are limited to the purposes of the mortgage or pledge; they cannot be read into the promise to pay, and so render a certain promise uncertain, convert a negotiable into a non-negotiable instrument. . . .

"But even if the two matters were to be read together, it is clear that the stipulations for additional collaterals and the sale of collaterals are pertinent only to the pledge part of the transaction, and that the only condition which could, in any event, be carried into the promise to pay part is the one by which maturity might be anticipated."

[151] Hunter *v.* Clarke, 184 Ill. 158 (1900); Farmer *v.* First National Bank of Malvern, 89 Ark. 132 (1909). Des Moines Savings Bank *v.* Arthur, 163 Iowa, 205, 143 N. W. 556 (1913, N. I. L.) distinguishing Iowa National Bank *v.* Carter, 144 Iowa, 715, 123N. W. 237 (1909, N. I. L.), a chattel note case, which seems a close parallel.

[152] Commercial Bank of Selma *v.* Crenshaw, 103 Ala. 497, 15 So. 741 (1893). See note 156.

[153] Kennedy *v.* Broderick, 216 Fed. 137 (1914, N. I. L.)

And a similar position is taken by Judge Carroll in the Kentucky Supreme Court:[154]

"It is quite usual to pledge collateral as security for the payment of a negotiable note, and we do not think that any narrow construction of the law should be adopted that would have the effect of impairing the use of this kind of security or that would deny to the holder the right to insist that if the value of the collateral deposited should become impaired, the maker must strengthen it or else precipitate the maturity of the paper. This condition in the note is merely supplementary to the fixed and controlling promises and is really nothing more than additional security for the payment of the instrument. It is not, strictly speaking, 'an order or promise to do an act in addition to the payment of money,' but is rather an order or promise to do an act that will better secure the promise to pay the money stipulated at the time fixed in the note. If this condition or promise would disturb the negotiability of commercial paper the effect would necessarily be to lessen the usefulness of collateral as security, because holders of paper would not be disposed to accept collateral, much of which has a fluctuating value, if they were denied the right to insist that its value should be maintained in an amount sufficient to serve the purposes for which it was accepted."

These two decisions and the cases in accord [155] are therefore correct in holding that the acceleration provisions in the usual bank collateral note do not impair its negotiability. The result should be reached both at common law and under the Negotiable Instruments Law, which does little more in relation to this problem than declare broad common-law principles.[156]

The application of the three fundamental principles of this

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[154] Finley *v.* Smith, 165 Ky. 445, 453, 177 S. W. 262 (1915, N. I. L.).

[155] See note 128, *supra*.

[156] Interesting modifications of the usual collateral note problem are presented by the obligations which the National Salt Company of New Jersey issued in 1901. These were secured by stock of an underlying corporation, the United Salt Company. The maker agreed that until payment no contract or improvements of the underlying company for utilizing steam in the manufacture of salt should be mortgaged, encumbered, or disposed of; that no money borrowed or advanced by the maker for improving or operating the property of the underlying corporation should be a lien against the assets thereof; that the underlying corporation should not dispose of its patent rights except for licenses upon a stated royalty. As this was essentially an agreement to maintain adequate security, it was rightly held not to impair negotiability. National Salt Co. *v.* Ingraham, 143 Fed. 805 (C. C. A., 2d, 1906). *Contra*, Strickland *v.* National Salt Co., 79 N. J. Eq. 182, 81 Atl. 828 (1911), non-negotiable as containing a promise to do an act in addition to the payment of money. And see National Salt Co. *v.* Ingraham, 122 Fed. 40 (C. C. A., 2d, 1903).

article [157] clear up any further difficulties attending the negotiability of these collateral notes. The first principle required the acceleration of a negotiable instrument to be by an act incidental to the collection of the instrument by business methods. It is clear that security is closely related to the life of a negotiable instrument. The return of collateral is a kind of implied condition of the promise to pay a note or the order to pay a bill.[158] The demand upon the maker to keep the collateral adequate or its sale upon depreciation may fairly be considered a part of its collection, as modern business goes, as much as presentation for acceptance or the demand for payment. Consequently acceleration by such acts or the accompanying default of the maker is as permissible as acceleration by nonacceptance or failure to pay on demand.

As a result the second and third principles govern these notes. Since there are not two coequal maturities, but one main maturity, the fixed date of payment, with a merely incidental provision for acceleration, a purchaser can rely on the fixed date, and regard the instrument as not overdue until then,[159] without troubling to inquire whether any act of acceleration has taken place. This is once more analogous to the rule of *Dunn* v. *O'Keefe* [160] regarding the acceleration of ordinary bills of exchange by nonacceptance, which does not affect subsequent purchasers without notice. On the other hand, holders having notice of the fact of acceleration, *e. g.*, from the absence of collateral which ought to be attached to the instrument, are bound to regard it as overdue from the day the act of acceleration occurred, for purposes of the Statute of Limitations, letting in equitable defenses, and charging indorsers. Thus, no difficulties about uncertainty of time arise.

It is worth noting that even when there is a duty to inquire about acceleration, the facts to be investigated are not truly extrinsic but part of the history of the instrument, very different from such events as the death of the maker's father, which is a permissible means of fixing payment. Furthermore, the collateral notes lack the uncertain value of the death notes, or those payable "on or before" a day at the maker's option, or installment notes absolutely

[157] See page 756, *supra*.

[158] See note on produce bills of exchange in 32 HARV. L. REV. 560; also, 30 HARV. L. REV. 514.

[159] Mackintosh *v.* Gibbs, 79 N. J. L. 40, 74 Atl. 708 (1909).

[160] 5 M. & S. 282 (1816); see page 671, *supra*.

due on default. The purchaser of a collateral note, so long as he is ignorant of any prior acceleration, can determine the price upon the basis of a fixed maturity, for he cannot be deprived of his investment until then except by his own consent.

The fitness of collateral notes with acceleration provisions to find a ready market is obvious. Some courts have objected to their length, having in mind the well-known phrase of Chief Justice Gibson,[161] "A negotiable bill or note is a courier without luggage." Judge Thayer remarked in 1895:[162]

"Under existing decisions permitting negotiable notes to contain a stipulation authorizing the sale at maturity of collateral securities, and, in some states, authorizing the insertion of an agreement to pay exchange and attorney's fees, as well as a warrant to confess judgment, such instruments have already been burdened with all of the luggage which they can conveniently carry. . . . It is easy to foresee that, if parties are permitted to burden negotiable notes with all sorts of collateral engagements, they will frequently be used for the purpose of entrapping the inexperienced and unwary into agreements which they had no intention of making, against which the law will afford them no redress."

Judge Shepard[163] admits that "the simple, short documents of early custom have grown into elaborate documents full of collateral undertakings of every nature that the development of modern business and systems of credits could suggest" and that "many of these additions have clearly demonstrated their merits as beneficial aids to credit and commerce." Nevertheless, "there must, at last, be some limit," and he puts these acceleration provisions beyond the pale. Such reasoning is obviously unsatisfactory.

It would certainly be unfortunate if a promissory note contained as many clauses in fine print as an insurance policy, but it would seem that acceleration provisions are so advantageous to circulation that they should be retained, subject to judicial control over any clauses which operate as a forfeiture of the security.[164] The oft-repeated epigram of Gibson has indeed "lost much of its apt-

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161 Overton *v.* Tyler, 3 Pa. St. 346, 347 (1846).

162 Lincoln National Bank *v.* Perry, 66 Fed. 887, 894 (C. C. A., 8th, 1895).

163 Commercial National Bank *v.* Consumers' Brewing Co., 16 App. D. C. 186, 201 *ff.* (1900).

164 See "Drastic Pledge Agreements," Murray Seasongood, 29 HARV. L. REV. 277.

ness since 1846," [165] and the modern promissory note with its careful safeguards against insolvency is no longer comparable to a courier without luggage, but rather to an automobile, fitted with every conceivable contrivance to prevent or repair a breakdown on the road.[166]

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[165] Holliday Bank *v.* Hoffman, 85 Kan. 71, 77, 116 Pac. 239 (1911).

[166] Space prevents the discussion of two topics closely related to the subject of this article:

Incorporation of Mortgages into Notes. — The question whether the reference in a note to a mortgage or trust deed incorporates its acceleration provisions is unsettled. Properly it should not be incorporated unless the note is made subject to its terms. Mere mention is not sufficient. Many cases go further. In this article I have accepted for purposes of my discussion the view of a court that the acceleration provisions of the mortgage formed part of the note. If so, their effect upon its negotiability is the same as if actually written on the note. "Why should the courier who carries his luggage in a trunk be held to be not excluded from the negotiable class because he has no hand baggage?" Brooke *v.* Struthers, 110 Mich. 562, 574 (1896). Some references are: 32 L. R. A. (N. S.) 858, note; 15 MICH. L. REV. 165; Lundean *v.* Hamilton, 159 N. W. 163 (Iowa, 1916); Westlake *v.* Cooper, 171 Pac. 859 (Okla. 1918).

Bonds. — Acceleration provisions in bonds have been more liberally viewed than those in promissory notes and bills of exchange, because of the strong mercantile recognition of negotiability. 2 MACHEN ON CORPORATIONS, § 1734 *ff.* There is reason to apprehend a narrower view, however, under the Negotiable Instruments Law, which apparently imposes its formal requisites on bonds, and so subjects them to the construction of the act which opposes acceleration by sale of collateral before maturity, etc., *Ibid.*, § 1740 *A*. For a recent decision against negotiability under a statute similar to the act, see Crocker National Bank *v.* Byrne, 173 Pac. 752 (Cal. 1918) criticized in 6 CAL. L. REV. 444.